STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 10, 1999
v	No. 213920 Oakland Circuit Court
DANIEL JOHN PITTAO, Defendant-Appellee.	LC No. 98-417024 AR

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 213921 Oakland Circuit Court
DANIEL JOHN PITTAO, Defendant-Appellee.	LC No. 98-417025 AR

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

In Docket No. 213920, the prosecution appeals by leave granted the circuit court's order affirming the district court's denial of the prosecution's motion to admit other acts evidence under MRE 404(b). We affirm.

In Docket No. 213921, the prosecution appeals by leave granted the circuit court's order affirming the district court's denial of the prosecution's motion to admit hearsay testimony under MRE 803(2). We affirm.

Defendant was charged with assault and battery[1] against his twelve-year-old son, Christopher. Christopher alleged that on May 10, 1997, defendant punched him in the head three times and kicked his legs during an argument over Christopher's chores. Christopher received treatment at a hospital for

swelling to his head. Defendant told police that he spanked Christopher in the buttocks with an open hand and did not know what caused the head injuries.

Defendant was also charged with domestic assault[2] against his wife, Tamara, stemming from a separate incident on July 5, 1997. Complainant Tamara Pittao (now deceased) alleged that defendant held her by the wrists while screaming vulgarities and spitting in her face after she informed him that she had filed for divorce. According to the prosecution, after Tamara Pittao broke free from defendant's grasp, she ran from the residence and frantically telephoned her friend Constance Fraser, telling Fraser that defendant had beaten her, shoved her into a closet, pulled her hair, spit in her face, and called her names. Defendant told police that he grabbed his wife "to restrain her" when she became angry during the argument, but let her go when she indicated she wanted to leave the residence.

Prior to defendant's trial on either charge, the prosecution filed motions to admit evidence under MRE 404(b) of twelve other acts by defendant, some involving Christopher, some involving Tamara Pittao, and some involving Constance Fraser, and to admit the statement Tamara Pittao made to Fraser under MRE 803(2). The district court ruled that the other acts evidence was not admissible in the prosecution's case in chief, but that it could be used on rebuttal if defendant took the stand.[3] The court also denied the motion to admit the hearsay evidence, but stated that it would reconsider admission after further development of the facts at trial if necessary. The prosecution appealed the district court's decisions on the motions to the circuit court, which affirmed the district court's orders.

On appeal, the prosecution first argues that the district court abused its discretion in denying the prosecution's motion to admit other acts evidence under MRE 404(b).[4] Specifically, defendant argues that the court erred in excluding evidence that on two occasions, defendant deprived Christopher of food and water for over five hours as punishment, that on one occasion, defendant slammed Christopher's head on concrete because he brought defendant the wrong can of soda, and that subsequent to the charged offense, defendant periodically harassed and intimidated Christopher by sitting in the driveway of his home. The trial court has discretion to decide if evidence should be admitted or excluded, and we will not disturb its decisions absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We will find an abuse of discretion only where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Riegle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). This Court will not find an abuse of discretion merely because it determines that it would have ruled differently on a close evidentiary question. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

MRE 404(b) governs admission of evidence of bad acts. It provides, in pertinent part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or

> acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The standard regarding the admissibility of other acts evidence is set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence must be offered for a proper purpose under MRE 404(b); it must be relevant under MRE 402, as enforced through MRE 104(b); and, under the balancing test of MRE 403, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* at 74-75. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

In the trial court, the prosecution offered the evidence of defendant's other acts of abuse to prove defendant's identity, motive, and intent to commit the charged offenses, as well as his knowledge, pattern of conduct, and absence of mistake or accident. Most of these are listed as proper purposes under 404(b). However, because prior bad acts are not intrinsically relevant to the listed purposes, "[m]echanical recitation of [proper purposes], without explaining how the evidence relates to the recited purposes is insufficient to justify admission under MRE 404(b)." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The prosecution bears the burden of establishing that the proffered evidence is truly relevant, that is, "that the defendant's prior [bad acts] establish[] some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in this case." *Id.* at 391. Evidence is relevant if it is material and has probative value. *Id.* at 388. The elements of an offense are always at issue and therefore material. *Id.* at 389. Evidence has probative value if it has some tendency to make the existence of a fact or consequence more or less probable than it would be without the evidence. *Id.* at 390.

Here, the only purpose for which the prosecution fully articulated a theory of relevance in the trial court was that of proving defendant's intent. An element of assault and battery is intent. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). Thus, the proffered evidence was material. Next, to establish probative value, the prosecution needed to "weave a logical thread linking the prior act to the ultimate inference" of defendant's intent to commit an assault and battery on his son. *Crawford, supra* at 390. Citing the discussion of the theory of relevance known as "the doctrine of chances" in *VanderVliet, supra* at 79-80 n 35, the prosecution argued that the proffered evidence was probative with regard to mens rea in this case, because the more often a defendant commits an actus reus, the less likely it is that he acted accidentally or innocently. See *id.*, citing Imwinkelried, Uncharged Misconduct Evidence, § 3:11, pp 22-23. However, unlike *VanderVliet*, where the defendant, a case manager working with developmentally disabled young men, argued that he was not guilty of sexual misconduct because any sexual contact he had with the victim's private areas was inadvertent or accidental, *id.* at 77, the facts of this case do not support an inference of accident, mistake, or innocent touching. Defendant has asserted that he only spanked Christopher on the buttocks; he told police he did not know how Christopher received the injuries to his head.

Moreover, except for the incident where defendant allegedly slammed Christopher's head on concrete, the proffered other acts are not factually similar to the charged act. In *Crawford*, our Supreme Court discussed the importance of similarity between the defendant's prior acts and the crime with which he is charged when proffering other acts under the theory of the doctrine of chances:

> Elaborating on the foundational requirements for triggering the doctrine of chances to prove mens rea, Imwinkelried explains that the prosecutor must "make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person." [*Id.* at 394; citation omitted.]

The prosecution in this case made no such showing in the trial court with regard to the incidents of harassment and food deprivation; thus, we find that the prosecution did not carry its burden of establishing the required relevance with regard to those acts. Given the minimal probative value of defendant's single similar "other bad act" of slamming Christopher's head, and the substantial risk of unfair prejudice, see *Crawford, supra* at 391 n 9, we find no abuse of discretion in the trial court's denial of defendant's motion to admit the proffered other acts evidence in its case in chief.[5]

However, depending upon defendant's testimony, should he choose to testify, the probative value of the other acts evidence could increase significantly. Thus, the trial court explicitly left open the possibility that the other acts evidence could be admitted as rebuttal or impeachment evidence. This ruling is appropriate and in keeping with *VanderVliet, supra* at 89-90. Accordingly, we do not intend our decision in this matter to preclude the trial court from considering admission of the proffered other acts evidence at a future point in the proceedings.

The prosecution also argues that the district court abused its discretion in denying the prosecution's motion to admit hearsay testimony under MRE 803(2). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible evidence except as provided by the Michigan Rules of Evidence. MRE 802. Excited utterances are an admissible form of hearsay under MRE 803(2). An excited utterance is considered inherently reliable because "it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *Smith, supra*. In order for a statement to be admitted into evidence as an excited utterance, (1) there must have been a startling event, and (2) the resulting statement must have been made while under the excitement caused by the startling event. *Id.*. An excited utterance is inadmissible without independent proof that a startling event occurred. *People v Hendrickson,* 459 Mich 229, 237; 586 NW2d 906 (1998).

Here, the prosecution claims that defendant's statement to police indicating he restrained Tamara Pittao during their argument, which is the only independent evidence offered to show that the alleged startling event occurred, is sufficient independent evidence that Tamara Pittao's statement to Fraser during their later telephone conversation was an excited utterance. Whether this statement constitutes sufficient evidence that a startling event occurred and that Tamara Pittao made the statement while under the excitement caused by this event is a close question. Although we would be inclined to rule that the prosecution satisfied the requirement of independent evidence of a startling event, we cannot say that the district court abused its discretion in ruling to the contrary.

The trial court stated that it would consider admitting the evidence after further development of the facts at trial. Again, our ruling does not preclude the trial court from determining in future proceedings that this evidence is admissible.

Affirmed.

/s/ Brian K. Zahra
/s/ Jeffrey G. Collins

[1] MCL 750.81(1); MSA 28.276(1).

[2] MCL 750.81(2); MSA 28.276(2).

[3] The prosecution argued in its motion to admit other acts evidence that, "even if the evidence were to be found inadmissible under MRE 404(b), the defendant is still not entitled to exclusion of the People's proffered evidence because such is admissible as rebuttal under MRE 405(b) if Defendant chooses to take the stand at trial."

[4] On appeal, the prosecution limits its challenge to the exclusion of other acts evidence involving his son that was proffered in the assault and battery case. Thus, the propriety of the district court's exclusion of other acts evidence involving Tamara Pittao or Constance Fraser is not at issue.

[5] We note that the theory of admission articulated by the dissent, particularly the argument regarding the probative value of the evidence, was never developed in the trial court. We do not believe that, under these circumstances, a finding of an abuse of discretion can be predicated on the trial court's failure to infer arguments not articulated by the prosecution.